Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEE'S INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL., PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED JUNE 3, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

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STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1940

No. 68

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as business agent, organizer, and vice-president, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;
MILWAUKEE BUILDING TRADES COUNCIL
All affiliated with the American Federation of Labor,

Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a corporation,

Respondents and Appellees.

SUPPLEMENTAL CASE

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In view of the fact that the case compiled by the petitioners and appellants is incomplete and inaccurate and fails to fairly and fully set forth all that part of the record and evidence which the respondent, Plankinton House Company, deems material, it is necessary to file a supplemental case.

In the first place, although Plankinton House Company, a Wisconsin corporation, was the complainant before the Wisconsin Labor Relations Board and expressly made a party respondent by the Honorable Gustave G. Gehrz in the review proceedings had in the Circuit Court of Milwaukee County, Wisconsin, as per the order and judgment of said Court and as also shown by the notice of appeal to this Court, nevertheless the appellants failed to include the Plankinton House Company as a respondent and appellee in the title and caption of the printed case. It is, therefore, necessary to set forth the record pertaining to the propriety of our presence and the evidence covering other matters not fully reported. Mere misspelling of words and typographical errors appearing in the case have been ignored.

37-38 CIRCUIT COURT ORDER MAKING PLANKINTON HOUSE COMPANY A PARTY RESPONDENT

(Venue and title omitted)

Upon reading and filing the petition of Plankinton House Company, and it appearing to the Court that the Plankinton House Company desires to ap-

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pear in the above entitled matter and to submit oral arguments and written briefs in support of the constitutionality of the Wisconsin Employment Peace Act, the jurisdiction and the validity of the order of the Wisconsin Employment Relations Board, and all other pertinent issues arising in the above entitled matter.

NOW, THEREFORE, IT IS ORDERED that the Plankinton House Company be and hereby is permitted to appear in the above entitled action and
38 to submit oral arguments and written briefs in support of the constitutionality of the Wisconsin Employment Peace Act, the jurisdiction and the validity of the order of the Wisconsin Employment Relations Board, and all other pertinent issues arising in the above entitled action.

Dated this 8th day of April, 1940.

BY THE COURT:

GUSTAVE G. GEHRZ,
Circuit Judge.

58-89 CIRCUIT JUDGE'S MEMORANDUM DECISION

(Venue and title in which Plankinton House Company is expressly denominated "an intervening respondent" is omitted and only pertinent portions printed.)

These actions, instituted upon petitions for review, have been thoroughly presented on both facts and law on behalf of all immediate parties named
59 in the title and *others to whom due leave was*
60 *granted* (italics ours). * * * The attack upon the

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constitutionality of the "Employment Peace Act" now made was sought to be sustained in that suit (referring to the case of *Ward Whitney, et al. v. Local 122 of the Hotel & Restaurant Employees' etc. Alliance, et al.*, Case No. 169-311) but was expressly reserved for determination in the instant review proceeding with all, and not only a small number, of the parties vitally affected before the Court and accorded their just and adequate opportunity to be heard. * * *

91-95 JUDGMENT OF THE CIRCUIT COURT

(Venue and title in which Plankinton House Company is expressly named a respondent is omitted and only pertinent provisions printed.)

92 The petitioners appeared by Padway, Goldberg & Tarrell and the respondent, Wisconsin Employment Relations Board, appeared by John E. Martin, Attorney General, James Ward Rector, Deputy Attorney General, and N. S. Boardman, Assistant Attorney General. At the commencement of said hearing, Richardson, Robertson, Reeder & Stearns asked leave to appear as amicus curiae in this case, No. 170-382 and to file a brief for and on behalf of the Plankinton House Company; Shea & Hoyt asked leave to appear and file a brief amicus curiae for and on behalf of the Milwaukee Hotel Wisconsin Company in case No. 170-383; George E. Burns asked leave to appear amicus curiae and file a brief in the Plankinton House representation cases, Nos. 170-381 and 170-880; * * *

93 After opening statements as to the nature of the cases and the issues involved and *it appearing to*

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the court that the first three named firms might more properly appear for and on behalf of their clients as parties, said clients having been parties in the proceedings before the Board and *there being no objection thereto, the Plankinton House Company was made a party respondent in this case, No. 170-382, appearing by Richardson, Robertson, Reeder & Stearns by Mr. Herman M. Knoeller;* * * * (Italics ours).

95 Dated May 14, 1940.

BY THE COURT:

GUSTAVE G. GEHRZ,
Circuit Judge.

122-123 NOTICE OF APPEAL

(Venue omitted)

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as business agent, organizer, and vice-president, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., and
PLANKINTON HOUSE COMPANY, a corporation,

Respondents.

TO: JOHN E. MARTIN, Attorney General, Attorney for Wisconsin Employment Relations Board and the members thereof;

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RICHARDSON, ROBERTSON, REEDER & STEARNS, Attorneys for Plankinton House Company;
FRED JAEGER, Clerk of Circuit Court, Milwaukee County, Wisconsin:—

YOU WILL PLEASE TAKE NOTICE that the petitioners above named hereby appeal to the
123 Supreme Court of the State of Wisconsin from the Judgment, Orders, and Decrees made, rendered, and entered in the above entitled action in the Circuit Court for Milwaukee County, Wisconsin, on May 14, 1940, and from the whole and every part thereof.

YOU WILL TAKE FURTHER NOTICE that the petitioners further appeal from the order made and entered on May 17, 1940, by the Circuit Court for Milwaukee County, Wisconsin, limiting petitioners' conduct in the premises, and denying a stay of the Court's judgment, orders, and decrees, and from the whole thereof.

Dated this 18th day of May, 1940.

PADWAY, GOLDBERG & TARRELL,
Attorneys for Petitioners.

48-50 AFFIDAVIT OF GENERAL MANAGER FOR PLANKINTON HOUSE AND HOTEL KILBOURN AS TO CONTINUING MISCONDUCT OF UNIONS AND IN SUPPORT OF MOTION FOR IMMEDIATE ENFORCEMENT OF THE BOARD'S ORDER

(Venue and title omitted)

Hiram O. Wood, first duly sworn, deposes and says that he is General Manager of the Plankinton

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House and Hotel Kilbourn, owned and operated by the Plankinton House Company:

1. That the order of the Wisconsin Employment Relations Board dated February 15, 1940, was duly received on February 16, 1940, by the Plankinton House Company and as your affiant is informed and believes copies of said order were received by the respective respondents above mentioned on or about the same day.

49 2. That although more than a month has elapsed since receipt of said order, the respondents above mentioned have failed, neglected and refused to comply therewith and contrary to the provisions of said order, have continued to maintain pickets at all the entrances to the Plankinton House and the Hotel Kilbourn owned by Plankinton House Company; the number of such pickets so maintained from day to day ranged from one to twenty-two and the respondents above named still continue to interfere with the patrons and prospective guests of the Plankinton House Company, to boycott and interfere with deliveries to and from the places of business of the Plankinton House Company and continue to engage in other concomitant actions of a strike in defiance of the Board's order. Thus:

(a) On numerous occasions since February 16, 1940, to date the pickets parading before the entrances of the hotel have shouted at patrons and prospective guests the following language, "This is a scab hotel"; "There are 27 other good union hotels in Milwaukee, nobody but scabs come in here."

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(b) Between February 15 and March 11, 1940, on several occasions the pickets parading in front of the entrances of the Hotel Kilbourn have stopped prospective guests who were about to enter the hotel and diverted them from patronizing the hotel by saying, "Why stay at a scab hotel when there is a good union hotel, the Medford, just across the street?"

(c) On February 16th at about 10:00 o'clock in the evening approximately twenty-two pickets paraded at the different entrances of the Plankinton House and booed, shouted and jeered at both guests and employees entering and leaving the hotel for almost an hour.

(d) On February 22, 1940, at about 6:00 o'clock in the evening when the Lions Club was holding a party in the Sky Room of the Plankinton House three or four pickets became very boisterous and sneered at the guests and employees of the hotel at the same time shouting "scab hotel."

50 (e) On February 22, 1940, at about 10:00 o'clock in the evening a guest of the Plankinton House sought to enter the same but was surrounded by the pickets, booed and jeered to such an extent that he complained very bitterly to the management of the hotel and the police.

(f) Since February 15th almost every weekday the Express Company has complained that the deliveries at the back door of the Plankinton House have been impossible because of interference on the part of the pickets who have ordered the Ex-

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press Company to stop delivering at the entrance. In a great many cases guests of the hotel have been required to call at the Express Company office for large, bulky and heavy packages and bring them to the hotel themselves at the expense of cab fare and their own time. In other cases it has been necessary for the hotel to send their truck to the Express Company to get deliveries for which the Express Company had already been paid at considerable increased cost to the Plankinton House Company.

3. The failure of the above mentioned respondent unions, their officers and members, to comply with the order of the Board has seriously affected the business of the Plankinton House Company and is causing considerable loss in business and revenue and unless the picketing, boycotting and interference with the deliveries are immediately restrained, an incalculable loss in business, patronage and revenue will be suffered by the Plankinton House Company, for already five conventions and innumerable dinner parties have been diverted by union interference from the Plankinton House.

HIRAM O. WOOD (Signed).

(Jurat omitted.)

103-109 AFFIDAVIT OF GENERAL MANAGER FOR PLANKINTON HOUSE AND HOTEL KILBOURN AS TO CONTINUING MISCONDUCT OF UNIONS AND IN OPPOSITION TO MOTION FOR STAY

(Venue and title omitted)

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HIRAM O. WOOD, being first duly sworn, on oath, deposes and says that he is General Manager of the Plankinton House and the Hotel Kilbourn, owned and operated by the Plankinton House Company:

1. That from May 15, 1939, to July 11, 1939, negotiations were carried on for the amicable settlement of the differences existing between the Plankinton House Company and the above mentioned unions relating to a new labor contract, but that said negotiations were cancelled by the attorneys for the above named unions who demanded arbitration by their written letter dated July 11, 1939.

104 2. That from July 11, 1939, to October 30, 1939, the labor controversy existing between the Plankinton House Company and the above named unions was submitted to a board of arbitration, which, on the last mentioned date, rendered an award which was accepted as final and binding by the Plankinton House Company.

3. That the above named unions refused to accept the arbitration award, and that ever since November 2, 1939, when a strike was called by the above named unions, the said unions, their officers, members, and agents have engaged in, promoted, and induced picketing, boycotting, and other overt concomitants of a strike without a majority in a collective bargaining unit of the employees of the Plankinton House Company against whom such acts were primarily directed having voted by a secret ballot to call said strike.

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4. That by reason of the acts of violence and unfair labor practices committed by the aforesaid unions, their officers, members, and agents, the Plankinton House Company on November 20, 1939, petitioned the Wisconsin Employment Relations Board for relief, and that upon issue joined by said unions the entire labor controversy between the parties involved was fully heard and finally determined by the order of the Wisconsin Employment Relations Board dated February 15, 1940, and duly received on February 16, 1940, by the Plankinton House Company and, as your affiant is informed and verily believes, copies of said order were received by the respective petitioners above named on or about the same day.

5. That by the last mentioned order of the Wisconsin Employment Relations Board, petitioners were found guilty of unfair labor practices and, among other things, directed to immediately cease and desist from:

(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind the pursuit of lawful work by the employees of the Plankinton House Company;

105 (c) Boycotting in any way the Plankinton House Company.

6. That on February 24, 1940, the above named unions petitioned the Circuit Court of Milwaukee

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County for a review of the Board's order and on March 16, 1940, the Attorney General of the State of Wisconsin petitioned the same Court for enforcement of said order.

7. That on May 14, 1940, after extensive oral and written argument filed by counsel in the matter, this Court sustained, confirmed, and ordered enforced in full the Findings of Fact, Conclusions of Law, and the final Order of the Wisconsin Employment Relations Board dated February 15, 1940, and, among other things, further specifically ordered and decreed that the above named petitioners immediately cease and desist from:

(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

8. That on the same day that this Court signed and entered its judgment, all the above named unions and individuals designated petitioners procured an order to show cause from the above Court returnable on May 16, 1940, at 2:00 o'clock in the afternoon, why a stay of the judgment and orders made and entered by this Court should not be granted based upon the affidavit of Phil L. Valley, who is Business Manager of Local 122, Hotel & Restaurant

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Employees' International Alliance, and was specifically found guilty by the Wisconsin Employment Relations Board and the Circuit Court of Milwaukee County of unfair labor practices and illegal conduct on several occasions during the course of the labor controversy existing between the parties.

9. That although almost three months have elapsed since the receipt by the above named labor unions, their officers, members, and agents of the order of the Wisconsin Employment Relations Board,
106 and although the said parties, upon information and belief, know the decision of this Court and the judgment thereof directing them to immediately cease and desist from engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel of attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company or boycotting in any way the Plankinton House Company, the said unions, their officers, members, and agents thereof have failed, neglected, and refused to comply with the order of said Board and the judgment of this Court and, contrary to the provisions thereof, have continued to maintain pickets at all the entrances of the Plankinton House and the Kilbourn Hotel; that the number of said pickets so maintained from day to day ranges from one to twenty-two and the above named petitioners still continue to interfere with the patrons and prospective guests of the Plankinton House Company, to boycott and inter-

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fere with the deliveries to and from the places of business of the Plankinton House Company, and continued to engage in overt concomitant acts of a strike, to-wit:

(a) On numerous occasions since February 16, 1940, and to date the pickets parading before the three entrances of the hotel and carrying placards have shouted at patrons and prospective guests of the hotel the following language: "This is a scab hotel; there are twenty-seven good union hotels in Milwaukee; nobody but scabs come in here."

(b) Between February 15th and March 11, 1940, on several occasions the pickets parading in front of the entrances of the Kilbourn Hotel have stopped and prevented prospective guests who were about to enter the hotel and diverted them from patronizing the hotel by saying, "Why stay at a scab hotel when there is a good union hotel, the Medford, just across the street?"

(c) On February 16, 1940, at about 10:00 o'clock in the evening when guests were about to retire, aproximately twenty-two pickets paraded in close formation and in a boisterous manner before the
107 different entrances of the Plankinton House and booed, shouted, and jeered for almost an hour at both the guests and the employees entering and leaving the hotel.

(d) On February 22, 1940, at about 6:00 o'clock in the evening when the Lions Club, a Milwaukee service club, was holding a party in the Sky Room of the Plankinton House, three or four of the pickets

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paraded before the entrances of the hotel in a militant and boisterous manner sneered and shouted, "Scab hotel, scabs" at the guests and employees of the Plankinton House.

e) At about 10:00 o'clock in the evening of the same day, February 22, 1940, a guest of the Plankinton House sought to enter the same but was surrounded by the pickets, denounced, booed, and jeered at by them to such an extent that he became intimidated, sought the aid of the police, and complained bitterly to the management of the hotel.

(f) Since February 15, 1940, almost every weekday the express company and other private transportation companies have complained that deliveries at the rear entrance of the Plankinton House have become practically impossible because of the interference and obstruction on the part of the pickets who have ordered the express company and other transportation companies to cease deliveries at the hotel; many guests of the hotel have been greatly inconvenienced and forced to call at the express company office themselves for large, bulky, and heavy packages and bring them to the hotel with the attendant additional expense and loss of time; on other occasions it has been necessary for the hotel to send their own truck to the express company or other transportation companies to obtain deliveries of packages and trunks, for which the express company or other transportation companies have already been paid, all to the increased cost and expense of the Plankinton House Company.

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Thus, on May 5, 1940, a guest of the Plankinton House, a traveling man, attempted to check his trunk with the North Shore Railway at Chicago,
108 Illinois, for through delivery to the Plankinton House but was informed that the said carrier could not accept the same because of the strike condition and picketing at the point of delivery.

10. That the failure of the above mentioned unions, their officers, members, and agents to comply with the order of the Wisconsin Employment Relations Board, confirmed by the judgment of this Court, has seriously affected the business of the Plankinton House Company and is causing it considerable loss in business and revenue, and unless the illegal conduct, unfair labor practices, picketing, boycotting, and interference with the business, guests, employees, and especially deliveries to and from said hotel are immediately restrained, incalculable loss and irreparable damage are being and will be suffered by the Plankinton House Company and greater injury will be inflicted upon the Plankinton House Company by granting a stay of enforcement of the orders of the Wisconsin Employment Relations Board and the judgment of this Court than will be inflicted upon the above named unions and petitioners by a denial of such stay; that despite the presence twenty-four hours of each day of police officers charged with the duty of protecting the Plankinton House Company's property, guests, employees, and suppliers, numerous acts of violence, breach of the peace, crimes, and misdemeanors have been committed by the above namd unions, their

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officers, members, and agents as set forth in the Findings of Fact, Conclusions of Law, and final Order of the Wisconsin Employment Relations Board and the written decision of this Court, and that said unfair labor practices and illegal conduct still continue, to-wit:

(a) About fourteen conventions and innumerable dinner parties have been diverted from the Plankinton House by union interference, intimidation, picketing, boycotting, and coercion since the calling of the strike by the unions above named. Among the numerous instances thereof, your affiant specifies the following:

(1) On March 5, 1940, the state convention of a large service club, the Optimist Club, although definitely committed and contracted for the Plankinton
109 House Company, was cancelled by reason of the acts of the above named unions.

(2) In the last week of April, 1940, the annual convention of a large insurance company, Travelers Protective Association, which had been definitely arranged for the Plankinton House where it had been held for the last five years, was cancelled by reason of the acts, especially the illegal picketing, of the above named unions.

(3) On about May 1, 1940, John Alexander, an organizer for the Hotel & Restaurant Employee's International Alliance, Local No. 122 mentioned above, together with representatives of the Inside Workers Union and the Laundry Drivers Union, urged the officers of the Wisconsin State Laundry

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Owners Association to cancel their valid existing convention contract or reservations for rooms, lunches, and dinners had with the Plankinton House Company.

(b) During the week of May 6, 1940, the pickets parading in front of the entrances of the Plankinton House were militant and boisterously shouted at patrons and prospective guests the following language: "Scabs, this is a scab hotel, nobody but scabs come in here."

(c) Picketing by the above named unions still continues at all the entrances of the Plankinton House and the Kilbourn Hotel and on May 15, 1940, there were from one to four pickets at each of the three entrances of the Plankinton House and at each of the two entrances of the Kilbourn Hotel.

11. That this affidavit is made for the purpose of informing the Court of the true state of facts and in opposition to the motion of the above named unions for an order staying the enforcement of the final order of the Wisconsin Employment Relations Board and the judgment of this Court.

HIRAM O. WOOD (Signed).

(Jurat omitted.)

JOHN ALEXANDER

(Union Chairman of the Strike Committee)

called adversely as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

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Adverse Examination, by Mr. Knoeller.

232 I paid James O'Brien on one occasion on picket duty and also sent Charles A. McLaughlin to supervise the pickets and see to it that peace was maintained. I also directed Jack Heisdorf in the same spirit at the picket lines at the Plankinton Hotel and Kilbourn Hotel. I also directed Thomas O'Mahar to perform picket duty at the hotels and instructed him together with Larry McAllen and Joseph Hofich how to act on the picket line. * * *

233 Joseph Hofich still occasionally does picket duty
234 as a supervisor of the picket line. Several of the pickets mentioned have been arrested for disorderly conduct on the picket line and after their arrest were returned to the picket line. Jack Heisdorf, Charles McLaughlin, Larry McAllen, Joseph Hofich, and Thomas O'Mahar are still members of the union and in good standing.

Cross-Examination, by Mr. Goldberg.

235 Q. How did James O'Brien get on the picket line?

A. O'Brien came to me, he asked me if I were the chairman of the strike committee and if I had authority to pay pickets. I said "Yes." He said, "Well, I have been picketing." I said, "I don't know you. I got to check up on you, see who you are before I can consider you as a picket." When he told me his story—when I checked up that he was a member of our local before, but he wasn't a member then, and when this thing happened, told

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him that "You can't go any more on the picket line." I paid him off then and there and since that time I know O'Brien hasn't been on the picket line. I saw to it.

245-246 JOSEPH MUELLER

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Knoeller.

There were about fifteen pickets present at the time. They didn't say anything to me. Charles McLaughlin and John Heisdorf both took a swing at me and destroyed the floral decorations that I was carrying.

273 PEGGY HEHMEYER

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Cross-Examination by Mr. Goldberg.

The Plankinton Hotel gave a banquet or turkey dinner during the life of the union contract before the Thanksgiving dinner in 1939. The employees were permitted to have turkey every Christmas, every Thanksgiving Day since I have been there.

280 WAYNE BANNING

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

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Direct Examination, by Mr. Knoeller.

I saw Charles Alden, a picket, strike Robert Jeske three blows with his clenched fist. I was standing directly in front of him. Alden had his arm around Jeske's neck and was poking him in the ri s when I came up.

296-297 KARL WERWATH

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Knoeller.

The young men (from union headquarters) gave us a deadline as to when these boys (School of Engineering students working at the Plankinton Hotel) would have to stop working. Mr. Valley reiterated the same definite statement as was made by the young man and he further mentioned that these boys by not working, by not stopping work would probably jeopardize their future opportunities for work in any situation where a union might be in control of that work.

430-465 HALSEY COREY

called as a witness on behalf of the independent union, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. George Burns.

I am employed at the Plankinton House as an assistant engineer. I am the president of the inde-

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431 pendent union of the employees of the Plankinton House Company. The independent union was organized when a large number of employees that stayed in the Plankinton Hotel at the time the strike was called wanted to work peacefully and talked about what could be done to bring relief to the situation caused by the strike. We felt that one of of the best things that could be done would be to organize an independent union. I was personally active in the commencement of the independent organization. To find out what the other employees in the hotel thought about it, I and some of the other employees drafted a petition giving several of us a right as a committee to investigate the matter and see what could be done legally and we circulated the petition among the employees for signatures to see if we had the backing of the people. George Andrew, Gene Restahe, Ward Whitney, and I were named as the committee on the petition which
432 authorized us to investigate and engage legal counsel. Seventy-four of the employees of the Plankinton House signed the petition and we then engaged George Burns as our counsel.

At our first conference with Attorney Burns we (that is, the four committeemen) asked him if we had the right to form an independent organization and what steps were necessary to proceed therewith. We were advised that we did have the right to form an independent organization under the law and it could be any type of organization that we choose, but we were also advised very strictly

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that if the management had anything to do with it, had any connection with it whatsoever, that it would be outlawed.

Thereafter we decided to have a general meeting of the employees who signed the petition and mailed notices to that effect. We held the meeting at Kes-
433 selman Hall located at Mason and Broadway. Exhibit 27 is the minute book of the independent organization of the Plankinton House employees and the minutes of that meeting were signed by Merrill Sutherland, Secretary, and I as President and the minutes correctly represent what took place at that meeting. (Exhibit 27 admitted into evidence without objection.) There were approximately sixty-five employees of the Plankinton House present at that meeting. We presented mem-
434 bership cards to those present and they were signed by all the employees present and the minutes show that the membership cards were all acted upon and those present became members of the independent organization of the Plankinton House employees. We then elected officers. I was elected President, Jack Brownrigg Vice-President, Merrill Sutherland Secretary, George Andrew Treasurer, and on the bargaining committee were Hollis Stenchel and Adolph Heitman, Ward Whitney, Edna Hall, and Edward Knopf. Exhibit 28 consists of a pack of membership cards and are the cards that the employees signed making application for membership in the independent union. There are one hundred eighteen (118) of those cards and I personally

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know that each one who signed a card is an employee of the Plankinton House Company.

435 After the first organization meeting we asked the people that had not been present at the meeting but who were working and others who came back to work if they wanted to join our organization. Sixty-five out of our one hundred eighteen members joined after the first organization meeting. The members are employees of the Plankinton House Company working at the Plankinton House, the Kilbourn Hotel, and at the Plankinton parking stations.

Exhibit 29 is the Articles of Organization and By-
436 Laws of the independent union which were adopted at our first meeting.

At the meeting we first inquired of those present if they wanted to form an independent organization and asked for a discussion and there was quite an expression from those present strongly in favor of having an independent organization. None present opposed the organization. Then the Articles of Organization and By-Laws were read to the meeting, first entirely before passing upon the separate sections, and then separately. There were a number of suggestions from those present with reference to
437 additions and changes in the Articles and By-Laws and those additions and changes were finally adopted and are now set forth in detail in the organization minutes.

Exhibit 30 is the original petition that we circulated to find out if the people were interested in forming an independent organization and the sig-

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natures appearing thereon are of people who were working in the Plankinton Hotel at the time and that had been working there before the strike was called. (Exhibits 29 and 30 admitted into evidence.)

After we had completed our organization and secured a meeting of members who had not attended the first meeting we then had a meeting of the supreme council to formally accept the members.
438 The supreme council consists of nine members being the officers and the bargaining committee. Thereafter, approximately the 25th of November, when we thought we had a majority of the employees eligible to belong to the organization and had been employees prior to the strike we went to the management and asked for recognition of our independent union. Our first organization meeting was on November 21st and approximately a week after that we claimed to have a majority of the employees of the Plankinton House Company.

Exhibit 31 is the recognition agreement signed by E. L. Richardson, President of the Plankinton House Company, John Van Houten, Secretary of the Plan-
439 kinfon House Company, and Merrill Sutherland, Secretary, and Halsey Corey, President, on behalf of the employees.

(Exhibit 31 dated December 1, 1939, being a memorandum recognizing the independent union of the Plankinton House employees as the sole bargaining agent for all employees of the company, they appearing to have a majority of the employees of their company, together with all the other exhibits of-

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fered by the independent organization up to and including Exhibit 31, were thenreceivedinevidence.)

Cross-Examination, by Mr. Goldberg.

I have worked six years at the Plankinton House Company. I was a member of the Brotherhood of Firemen, Oilers, & Maintenance Men, Local 125, a recognized A. F. of L. union. I didn't know if the
440 management of the hotel had a contract with this union, but I did know that the management had a contract with other labor organizations at the hotel. So did the members of our bargaining committee and officers and we discussed that with Attorney Burns. We understood that there had been a contract signed with the hotel with this other labor organization but that it had terminated this summer some-
441-2 time, and we so told Mr. Burns. No explanation was made to the independent employees or signers of the membership cards that if the contract with the A. F. of L. continued until June 15, 1940, they would have to belong to the A. F. of L. unions covering their employment in order to work at the Plankinton House.

The demand made on the Plankinton House management to recognize our independent organization as the bargaining representative was in the form of a contract agreeing to enter into collective bargaining with the independent organization recognizing that we had a majority of the employees of the Plankinton House Company. The committee of
443 the independent union presented the contract in

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444 person. We first saw Mr. Wood. We presented to him our case, showed him our membership cards showing a majority and asked him to sign the contract recognizing us as the bargaining agent. Mr. Wood didn't sign it the day we first brought the contract to him. He said he would have to take it up with the attorney.

445 There was considerable discussion over whether we had a majority of the employees or not but we established it by our membership cards.

446 Outside of the conference with Mr. Wood in respect to the independent representing a majority of the employees, we had a conference with Mr. Richardson. This last conference took place three or four days after we had talked to Mr. Wood and was not the day the contract was signed. The conference with Mr. Richardson lasted, possibly an hour. We discussed the percentage of membership.
447 After the management had checked their records to make sure that the membership of the independent union shown by our membership cards represented a majority of the employees of the Plankinton House, it then signed the recognition contract. Thereafter the independent union signed the recognition contract represented by Exhibit 31.

448 The reason why we brought in parking station employees with hotel employees of the Plankinton House Company was because they composed one unit of the company as advised by our attorney, Mr. Burns.

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449 The Plankinton House Company had nothing to do with the organization of the independent union.

450 Neither Mr. Richardson nor Mr. Wood stated that they had a contract with the bartenders' union, the building trades employees, local 311 International Union of Operating Engineers, and, therefore, could not include the bartenders, building trades employees, or engineers in our unit, nor did they state that
451 the arbitration award had no bearing upon the relationship between the hotel and Local 64, Bartenders' Union, or Local 311, Engineers' Union, or Milwaukee Building Trades Council, nor did they state that they couldn't recognize the independent union because hey had a strike with Local 122, Hotel & Restaurant Workers, who were claiming that a contract exists or that there was a question of representation rights with another union or unions. The question of rates of pay, wages, hours of employment, or other conditions of employment was covered in the recognition contract. Neither Mr. Rich-
452 ardson nor Mr. Wood told us that Phil Valley had written them claiming a contract and that the recognition of any other union would be a violation of the contract and, therefore, the hotel could not recognize the independent union. The independent union committee saw Mr. Wood and Mr. Richardson dur-
453 ing working time. We were not docked wages because of the time lost in those negotiations. The independent union employees reached the Kesselman hall where they held their first organization meeting by taxicab. The taxicab fare was paid by

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the employees individually. The employees also paid for the hall from collections of initiation fees at the hall that night. Neither Mr. Wood nor Mr. Richardson told us the hotel had proceedings pending before the Wisconsin State Labor Relations Board and until a hearing was had and determination made they couldn't recognize us as representatives of the employees.

454 I was present on Thanksgiving Day at the Plankinton Hotel when all the employees were invited to a turkey dinner. Mr. and Mrs. Wood were present
455 as also Mr. and Mrs. Hoffman. I worked at the Plankinton House for nearly six years and we always had turkey on Thanksgiving, but on this day we had a dinner for all the employees collectively. This Thanksgiving turkey dinner did not in any way influence me in the formation of this union.

456 At the time the petition was circulated and the membership cards in the independent union were signed some of the employees inquired about a job after they left the Plankinton House if the independent union was recognized. They were told that in our opinion anybody that was capable of holding a job and applying for one would be able to find work.
457 There was a question asked as to the effect of joining a company union would have upon their ability to work any place in the city where the A. F. of L. had contacts. It was answered by saying that it was up to them—if they were able to find employment, they certainly would be able to work. I was never told that if I stuck to the Plankinton House I

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would have a lifetime job, nor did I hear any other employees so informed by Mr. Wood or anyone else.
458 Neither Mr. Wood nor anyone else ever told me or any other member of our independent union that I know of that the hotel would never sign with the A. F. of L. union but would fight it until it broke it or that the Plankinton House Company was rich enough to fight the union until they broke them.

When we spoke to Mr. Richardson and Mr. Wood about the amount of membership in our union, we first were considering only the employees of the Plankinton Hotel and they told us that we would have to consider the whole bargaining unit and that we didn't have a majority of the employees at the time of the first conference. We then conferred with our attorney who investigated the matter. Mr. Richardson and Mr. Wood did not say that we had to con-
459 sider all the Plankinton House Company employees but that there might be some question as to whether the complete bargaining unit wouldn't have to be included. They said that the hotels' attorneys would raise that question.

Re-Direct Examination, by Mr. Burns.

When I first spoke to Attorney Burns I did not know that the the Plankinton House Company also employed those at the Kilbourn Hotel and those at the parking stations and it was after I learned that I then sought the members in the Kilbourn Hotel and the parking stations for our independent union or-
460 ganization. After I had learned that fact Mr. Burns

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advised me that all persons working for a single company were considered a bargaining unit. We then secured members from the employees of the Kilbourn Hotel and from the parking stations.

461 (Exhibit 32 being a copy of the recognition contract with the following words endorsed thereon: "Delivered by Mr. Burns and committee to H. O. Wood on November 27, 1939, 4:15 P. M." offered and received in evidence; Exhibit 33 being the bank book of the independent organization of the Plankinton House Employees at the First Wisconsin National
462 Bank of Milwaukee, Wisconsin; Exhibit 34 being the check stub book of the independent organization; Exhibit 35 being a partial list of those who paid in the independent organization; Exhibits 36 and 36(a) being two receipt books of the Treasurer of the independent organization of the Plankinton House employees; Exhibit 37 being ledger of the individual members of the independent organization; Exhibit 38 being expense ledger of the independent organization identified by witness, all offered and received in evidence.)

463. *Re-Cross Examination, by Mr. Goldberg.*

Neither Mr. Wood nor Mr. Richardson read Section 111.02(6) of the Statutes relating to collective bar-
464 gaining to me. Mr. Burns didn't read the above section of the law but he did discuss it with us to the effect that all the employees of one company constitute a bargaining unit unless the employees themselves determine otherwise.

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After the first meeting of November 21st and after
465 our conference with Mr. Wood and Mr. Richardson, we did not call another meeting of the membership.

CAPTAIN JOHN W. POLCYN

called as a witness on behalf of the respondents, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Re-Cross Examination, By Mr. Knoeller.

617 We have had six policemen stationed about the Plankinton Hotel right from the very start of the strike on November 2, 1939, and in addition we had men on horseback there several times who also patrol the district and check traffic conditions. Several times when a delivery was desired to be made to the hotel or from the hotel, we sent down more policemen in addition to the six present as a matter
618 of precaution. We would borrow the policemen from the Kilbourn Hotel or from the Wisconsin Hotel and send about three or four additionl. Despite all these policemen about the hotel since November 2nd at the three entrances of the hotel, it is evident that the assaults and batteries related by me occurred.

DAN SAN MIGUEL

called as a witness on behalf of the respondents and having been duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Examination, by Commissioner Gooding.

626 Q. Was the talk between you and Mr. Wood down in the locker room friendly?

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A. Oh, very friendly talk. It was a friendly talk.

Q. And what about your—had there been—it wasn't friendly when you were talking upstairs at the desk, was it?

A. Well, he didn't give me a chance to talk. He just bawled me out right away. He didn't give me a chance to explain or say anything.

Q. And then when you went downstairs that was all over and you just talked in a friendly manner?

A. Yes.

641 CLARK M. ROBERTSON:

(Stipulation between counsel.)

MR. GOLDBERG: Yes, if you will tell me off the record we can stipulate, otherwise I may want to call you to the stand.

MR. ROBERTSON: I am not going to answer it that way. I am perfectly willing to tell my conversation with Mr. Luecki. Mr. Luecki made two suggestions, as I recall. One was that he talked to Mr. Rauch, I believe, who is now on the Industrial Commission, or was—I don't know—and he wanted to know whether there had been any meeting since the strike had been called, and I said there had not, and he wanted to know if there would be any objection to a Mr. Rauch coming into the picture with a view to seeing if Mr. Rauch would conduct some sort of an election. I took it from his conversation he hadn't talked to Mr. Rauch and I told Mr. Luecki we would be glad to consider anything pertaining

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to the situation at the hotel. He then asked me what the point in dispute—whether there was anything—whether the matter could be mediated in
642 any way and I told him the dispute, as far as we were concerned, was a clear-cut dispute on the issue of a closed shop under the terms of the arbitration award; that the union had indicated that it was very firm in its position and that we were very firm in our position. Accordingly, I didn't see that at the time there was any purpose to be served by any meeting on that issue.

MR. GOLDBERG:

Q. And that has existed to date?

MR. ROBERTSON: Yes.

MR. GOLDBERG: Well, that—I would be willing to stipulate that substantially that was your position without asking Mr. Robertson to take the witness stand.

MATT PECKMAN

called as a witness on behalf of the respondents, being first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Goldberg.

715. Mr. Wood told me that if the union didn't let the boy who was applying for the job as assistant houseman join the union, then we would be without an assistant houseman. I don't recall Mr. Wood ever speaking to me about not applying to the union for help.

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JOHN ALEXANDER

recalled as a witness on behalf of the respondents, having been previously first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Goldberg.

727 I am a member of the Hotel & Restaurant Workers' Union since last July when I led the C. I. O. Union into the A. F. of L. * * * I was invited by the C. I. O. to organize for the C. I. O. I did organize for the C. I. O. The C. I. O. got to be a 500 membership. I was President and Business Manager until I discovered that the C. I. O. was under the—rather the executive board within the C. I. O. was, out of twelve members, nine were members of the Communist Party, and it was under Communist domination and I decided to break away from the C. I. O. and I accomplished this after a long fight, to take them into the A. F. of L., and to my knowledge I think it is the first C. I. O. that did abscond from the C. I. O. to go into the A. F. of
728 L. I have worked in this industry in different parts of the country, such as San Francisco, New York, and Detroit.

Cross-Examination, by Mr. Knoeller.

741. I was connected with the C. I. O. until February 14, 1937.

742. Q. Now you have always advocated, haven't you, peaceful picketing and peaceful persuasion?

A. Yes, sir.

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Q. You have been quite a philosopher along that line, haven't you?

A. Yes, sir.

Q. Isn't it a fact, Mr. Alexander, you were in charge of the sitdown strikers who took possession of the Milwaukee Athletic Club and held its property in the year 1936?

MR. GOLDBERG: Just a minute. This isn't proper cross-examination, nor is the matter germane to this issue.

COMMISSIONER GOODING: May answer it.

A. We did not take possession of anything, Mr. Knoeller.

743. MR. KNOELLER:

Q. What year was that the M. A. C. had their labor trouble?

A. That was in 1937.

Q. And you were in charge of the pickets, weren't you?

A. Yes, sir.

Q. And there was a sitdown strike there, wasn't there?

A. Yes, but I did not—

Q. That's all.

A. Yes, O. K.

744 Irrespective of whether there is a particular clause in the hotel contract exempting the students or not from joining the union, as a matter of privilege to the students and the management we let
745 them work without joining the union. This was a

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gentlemen's oral agreement. This is true although I know that the hotel contract does not provide any specific exemptions for students. These subsequent
746 arrangements changing the express letter of the contract permitting students to work without joining the union are usually negotiated or performed by the Business Agents who are to keep an eye on those things and see to it that this oral agreement is carried out.

768-769. (Stipulation by counsel for the union that there is nothing in the union labor contract giving the union Business Agents free access to go into the hotel and the departments thereof to see who works there.)

PEGGY HEHMEYER

called in rebuttal on behalf of the complainant, having been previously sworn, on oath, was examined and testified as follows (only pertinent omitted matters printed):

Direct Examination by Mr. Knoeller:

777 I did not state to Margaret Thie or the girls that I didn't believe the union could do anything for the girls and if they had any request to make they should go to Mr. Wood.

779. I did not say to Margaret Thie or to anyone else on November 17th or any other time that the girls were fools for staying outside and sticking with Phil Valley, that he was a gangster and a racketeer and had changed his name three times and that the girls were more or less branded for being outside or they

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would have a hard time finding another job or that they were more or less branded as trouble-makers and that the girls that stayed inside would naturally get the cream of the crop after everything was going in full swing and they would have a lifetime job.

780-781 I did tell Mrs. Ruth Fairweather if she wanted to come back she would be given a room if she was in any way afraid to come in and go out of the hotel. This was said after Ruth Fairweather had come to the hotel pursuant to a telephone call she had made in advance. I told her that she had to decide for herself whether she wanted to work or stay outside. She stated that she had not come in the day before because she didn't know if she was doing the right thing by staying out.

Cross-Examination, by Mr. Goldberg.

801 Helen Martel was supposed to work Saturday and Sunday and she didn't work either day but she notified me or her husband notified me on M nday she wouldn't be in. It was the 30th of October that her husband called me—Teachers' Convention was on November 3rd.

HIRAM O. WOOD

recalled as a witness on behalf of complainant, having been previously duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Re-Cross Examination by Mr. Goldberg.

827 Exhibit 67 (printing company bill) is our invoice and it has my O. K. on it.

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828-829 John Heisdorf knew of my arrangement with Mr. Bournak in relation to delinquent payment of dues and also the matter of going into the departments and that the privilege would be given us to choose our own employees provided they join the union. Mrs. Heisdorf confirmed that understanding.

868-869 CERTIFICATION OF REPRESENTATIVES

(Venue and title omitted)

The Wisconsin Employment Relations Board, having held a hearing on petition for determination of representatives of the employees of the Plankinton House Company, Milwaukee, Wisconsin, pursuant to Sec. 111.05 Wis. Stats., and the Board having issued on February 15, 1940, an Order and Direction of Election, and having conducted on February 29, 1940, an election by secret ballot, and having found that the results of the election were as follows:

1. Total number of eligible to vote..... 145
2. Total ballots cast..... 135
3. Total ballots void..... 1
4. Total valid ballots cast..... 134
5. Ballots cast for Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization.. 130
6. Ballots cast against Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization.. 4

Now, therefore, by virtue of and pursuant to the power vested in the Wisconsin Employment Relations Board by Sec. 111.05 (3), Wis. Stats.,

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869 IT IS HEREBY CERTIFIED that the Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization, has been selected by a majority of the eligible employees of the Plankinton House Company, Milwaukee, Wisconsin, who voted at said election, in the unit consisting of all employees, excluding officers, directors, executives, and supervisors, as their representative for the purposes of collective bargaining, and that pursuant to the povisions of Sec. 111.05, Wis. Stats., said Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization, is the exclusive bargaining representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours and other conditions of employment.

Given under our hand and seal at the City of Madison, Wisconsin, this 6th day of March, 1940.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Henry C. Fuldner
Henry C. Fuldner, Chairman

L. E. Gooding
L. E. Gooding, Commissioner

R. Floyd Green
R. Floyd Green, Commissioner

(Seal of Wisconsin Employment Relations Board)

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EXHIBIT 69

NATIONAL LABOR RELATIONS BOARD

Twelfth Region

Madison Building

Milwaukee, Wisconsin

January 27, 1940

Plankinton House Company
609 N. Plankinton Ave.,
Milwaukee, Wis.

Re: PLANKINTON HOUSE CO.
Case Nos. XII-R-215
and XII-R-216

Gentlemen:

This is to advise you that the petitions in the above matter have been, by order of the Board dismissed.

Very truly yours,

JOHN G. SHOTT (Signed)
John G. Shott
Regional Director

Respectfully submitted,

RICHARDSON, ROBERTSON, REEDER & STEARNS,

Attorneys for Respondent,
Plankinton House Company.

HERMAN M. KNOELLER
Of Counsel.

[fol. 42] Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the second Tuesday, to-wit: the 9th day of January, A. D. 1940,

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson; Hon. Joseph Martin, Justices.

Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the twenty-first day of May in the year of our Lord One Thousand Nine Hundred and Forty came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Hotel & Restaurant Employees' International Alliance, Local No. 122, Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and Vice-President, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64, sometimes known as International [fol. 43] Bartenders & Beverage Dispensers, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, All affiliated with the American Federation of Labor, by their attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State.

[fol. 44] Filed May 20, 1940, Fred J. Jaeger, Clerk.
Filed May 21, 1940, Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

Case No. 170-382

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, Local No. 122; Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and Vice-President, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, All affiliated with the American Federation of Labor, Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of the Wisconsin Employment Relations Board and Plankinton House Company, a Corp., Respondents.

NOTICE OF APPEAL

To John E. Martin, Attorney General, Attorney for Wisconsin Employment Relations Board and the members thereof;

Richardson, Robertson, Reeder & Stearns, Attorneys for Plankinton House Company;

Fred Jaeger, Clerk of Circuit Court, Milwaukee County, Wisconsin:

You Will Please Take Notice that the petitioners above named hereby appeal to the Supreme Court of the State [fol. 45] of Wisconsin from the Judgment, Orders, and Decrees made, rendered, and entered in the above entitled action in the Circuit Court for Milwaukee County, Wiscon-

sin, on May 14, 1940, and from the whole and every part thereof.

You Will Take Further Notice that the petitioners further appeal from the order made and entered on May 17, 1940, by the Circuit Court for Milwaukee County, Wisconsin, limiting petitioners' conduct in the premises, and denying a stay of the court's judgment, orders, and decrees, and from the whole thereof.

Dated this 18th day of May, 1940.

Padway, Goldberg & Tarrell, Attorneys for Petitioners.

Statement As To No Necessity for Undertaking

Padway, Goldberg & Tarrel, attorneys for the above named petitioners, respectfully show to the court that the appeal in the above entitled matters is taken by virtue of Section 111.07(7), and in the manner therein provided by Section 102.25 of the Wisconsin Statutes, 1939, which obviates the requirement of the execution, service, or filing of any undertaking required by Section 274.11 (3), Wisconsin Statutes, 1939, in order to perfect such appeal.

Dated at Milwaukee, Wisconsin, May 18, 1940.

Padway, Goldberg & Tarrell, Attorneys for Petitioners.

[fol. 46] Western Union

(54)

1940 May 20 PM 3 59

Filed May 20, 1940. Fred J. Jaeger, Clerk.
Filed May 21, 1940. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

AUC162 38 DL—Madison Wis 20 3[illegible] P

Padway Goldberg & Tarrell
212 West Wisconsin Ave.

Service of Notice of Appeal in Case No. 170-382, Circuit Court Milwaukee County, entitled Hotel and Restaurant Employees, etcs., et al. v. Wisconsin Employment Relations

Board, et al. (Plankinton Case) admitted this twentieth dad of May, 1940.

John E. Martin, Attorney General,

170-382 etcs. et al. v. et al., 1940.

[fol. 47] (Endorsements)

170382

State of Wisconsin, Milwaukee County Circuit Court

Hotel & Restaup'nt Employees, et al., etc., Plaintiff

vs.

Wisconsin Employment Relations Board, et al., Defendant

#170-382

Notice of Appeal and Statement

Paid $12.00 appeal fee into court, 5/20/1940.

Copy received this 20th day of May 1940. Richardson, Robertson, Reeder & Stearns, Attorneys for Plankinton House Co.

Service admitted this 20th day of May 1940. Fred J. Jaeger, Clerk of Circuit Court, Milwaukee County, Wis.

Padway, Goldberg & Tarrell, Attorney- for Petitioners, 511 Warner Theatre Bldg., Milwaukee, Wis.

Filed May 20 1940. Fred J. Jaeger, Clerk.

Filed May 21 1940. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fol. 48] And afterwards, to-wit: on the 12th day of September, A. D. 1940, the same being the 4th day of said term, the following proceedings were had in said cause in this Court:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL., Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents

And now at this day came the parties herein, by their attorneys, and the argument of this cause having been commenced by I. E. Goldberg, Esq., and David Previant, Esq., for the said appellants, and by Newell S. Boardman, Esq., Assistant Attorney General, for the said respondent Board, and by Herman M. Knoeller, Esq., for the said respondent, Plankinton House Company, and there not being now sufficient time to complete the same, it is hereby continued for further argument.

[fol. 49] And afterwards, towit: on the 13th day of September A. D. 1940, the same being the 6th day of said term, the following proceedings were had in said cause in this Court:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL.; Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents

And now at this day came the parties herein, by their attorneys, and the argument of this cause having been resumed and completed, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 50] And afterwards, to-wit: on the 8th day of November, A. D. 1940, the same being the 19th day of said term, the judgment of this court was rendered in words and figures following, that is to say:

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, Local No. 122, Phil L. Valley, John Alexander, and Jack Heisdorf, each indiyidually, as business agent, organizer, and Vice-President, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, All affiliated with the American Federation of Labor, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, Individually and as a member of the Wisconsin Employment Relations Board and Plankinton House Company, a Corporation, Respondents.

Milwaukee Circuit Court. Opinion by Chief Justice Rosenberry

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed, with costs against the said appellants taxed at the sum of Two Hundred Seventy-seven and no/100 ($277.00) Dollars.

[fol. 51] Thereupon the opinion of the Court by Chief Justice Rosenberry was filed in words and figures following, that is to say:

[fol. 52] STATE OF WISCONSIN: IN SUPREME COURT

August Term, 1940. No. 68

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents.

APPEAL from a judgment of the circuit court for Milwaukee county. GUSTAVE G. GEHRZ, Circuit Judge. Affirmed.

This action was begun on February 24, 1940, by Hotel & Restaurant Employees' International Alliance, Local No. 122, Phil L. Valley, John Alexander and Jack Heisdorf, each individually, as business agent, organizer, and vice-president, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, all affiliated with the American Federation of Labor, petitioners, against Wisconsin Employment Relations Board, Henry C. Fuldner, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, [fol. 53] individually and as a member of the Wisconsin Employment Relations Board, and Plankinton House Company, a corporation, defendants, to review the findings, orders and decisions made by the Wisconsin Employment Relations Board in the proceeding before that board, entitled Plankinton House Company, a Wisconsin corporation, complainant, vs. Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., respondents, the findings having been made by the Wisconsin Employment Relations Board, hereafter referred to as the board, on February 15, 1940. The matter was heard by the court and on May 14, 1940, the court ordered and adjudged that the findings and conclusions of the board complained of be in all respects sustained, confirmed and enforced. From this judgment the petitioners appeal.

Inasmuch as only questions of law are raised upon this appeal we shall state only so much of the facts as are material to an understanding of these questions. The petitioners are certain labor unions described above together with individuals, personally and as agents and officers of said unions. The defendants are the Wisconsin Employment Relations Board and the Plankinton House Company. On the 16th day of June, 1938, the Plankinton House Company entered into a collective bargaining contract with the unions, which contract covered wages, hours and working conditions governing employees of the Plankinton House Company employed at the Plankinton House and the Kilbourn Hotel, and provided as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as employed by the Plankinton House Company.

[fol. 54] It was further provided that said contract was to continue for one year ending on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that such party desired to terminate the contract at the end of the contract year. There was also a provision for notice of continuance and a provision for subsequent negotiations. The unions served notice of continuance on May 15, 1939, but desired to negotiate for improved hours, wages and working conditions. The Plankinton House Company served notice that it desired to continue the contract for another year and desired to negotiate. Negotiations between the parties failed, arbitration was had in accordance with the terms of the contract and on October 30, 1939, the Plankinton House Company gave notice of its willingness to execute a contract in accordance with the terms of the arbitration award. On November 2, 1939, in the afternoon, the employees of the Company at both the Plankinton House and Kilbourn Hotel went on strike. Prior to calling such strike the employees did not vote by secret ballot to call such strike. Immediately after the strike was called, picketing was engaged in at the three entrances to the Plankinton House. Picketing was carried on by the members of all of the unions involved and pickets carried banners bearing the names of all petitioning unions. The business manager of the Hotel & Restaurant Employees International Alliance, Local No. 122, notified

Marquette University and the Milwaukee School of Engineering that all students working at the Plankinton House for their meals immediately discontinue such work and that unless such students did discontinue such work the union [fol. 55] would be forced to stop the employment of such students working at other hotels and restaurants in the city of Milwaukee which had collective bargaining contracts with Local No. 122; that ever since the strike the Plankinton House and the Kilbourn Hotel have continued to operate with new employees replacing the striking employees.

On November 4, 1939, union pickets by means of force prevented the delivery of floral decorations to the Plankinton House; that as a result of the altercation, Jack Heisdorf, vice-president of Local No. 122, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, convicted and paid fines. Charles McLaughlin returned to the picket line immediately after his arrest and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House and was again arrested, convicted and fined. Other fines were paid under similar circumstances by other striking employees and by pickets employed by the union. Convictions were had therefor.

Upon the basis of its findings of fact, the Board found as conclusions of law and made the following order:

"1. That the contractual relationship existing between the Plankinton House Company and the respondent unions was terminated by the respondent unions on the 2nd day of November, 1939, by the refusal of said unions to accept the award of the board of arbitration, and their act of calling a strike at the Plankinton House and the Kilbourn Hotel.

"2. That the respondent unions are guilty of unfair labor practices by cooperating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House Company by a secret ballot.

"3. That all of the former employes of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by cooperating and engaging in a strike without first obtaining the approval of a majority of such employes.

[fol. 56] "4. That the following named persons, by reason of threats and assaults made by them to and on employes of the Plankinton House or persons seeking to do business with the Plankinton House, or by misdemeanors committed by them arising out of the controversy between the respondent unions and the complainant, Plankinton House Company, are guilty of unfair labor practices. Phil L. Valley, Jack Heisdorf, Charles McLaughlin, Charles Alden, James C. O'Brien, John Thomas O'Maher, Joseph Hofich and Thomas James.

"Upon the basis of the foregoing findings of fact and conclusions of law the Board, pursuant to section 111.07 (4) of the Wisconsin Statutes, makes the following

Order

"It is ordered that the respondent unions, Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

With its answer to the petition to set aside and vacate the order the Board filed a petition and cross-complaint asking that the court enter an order confirming and enforcing all of the provisions of its order as amended. The petition and cross-complaint having been brought on for hearing, the court by its judgment sustained the findings of the Board and a judgment was entered accordingly sustaining, confirming and enforcing the order.

[fol. 57] ROSENBERRY, C. J. By ch. 57 of the Laws of 1939, the legislature repealed ch. 111 of the statutes of 1937 and created a new chapter to be designated ch. 111. We shall state only so much of this chapter as is necessary to present the questions to be considered. The chapter provides that it may be cited as the employment peace act.

Sec. 111.01 Stats. 1939, declares the public policy of the state as to employment relations and collective bargaining. It recognizes that there are three major interests involved, namely, that of the public, the employe and the employer.

Sec. 111.02 Stats. 1939, defines certain terms used in the chapter.

. . . . . .

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

"(6) The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do."

. . . . . .

"(8) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Sec. 111.06, Stats. 1939, defines what are unfair labor practices:

(1) (Not involved here.)

"(2) It shall be an unfair labor practice for an employe individually or in concert with others: * * *

(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt act concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

* * * * * * *

[fol. 58] "(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

While the briefs on both sides contain much matter relating to the history, background and philosophy of labor legislation, the *sole* contention made here is that subsec. (2) (e) 111.06 Stats. 1939 is unconstitutional and void (1) because it contravenes the guaranties of free speech afforded by the Fourteenth Amendment to the Constitution of the United States and Section 3 of Article I of the Constitution of the State of Wisconsin; (2) because it does not constitute a valid exercise of the police power of the state since it is for the vindication of a private right and not a public right; (3) because it is indefinite and uncertain because it establishes no means or standards wherein and whereby the requisite balloting can be conducted and the results thereof ascertained and is therefore incapable of application; and (4) because the terms "picketing", and "boycotting", are vague and indefinite; their use in

the statute and order is not sufficient to apprize the unions as to what conduct is or is not prohibited.

In order to determine whether the employment peace act is unconstitutional, it must first be construed. Petitioners argue that under the provisions of subsec. (2) (e) of the act sec. 111.06, Stats. 1939, and the order issued by the board pursuant thereto that individual employees are forbidden as individuals to do any of the things enumerated in the subsection except in support of an authorized strike. The legislature has very carefully and explicitly set out as an aid in the construction of the act what it intended to do in its declaration of policy. In addition to that sec. 111.15, Stats. 1939, provides:

[fol. 59] "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes (unemployment benefits)."

The legislature also amended ch. 103, Stats., entitled Employment Regulations, but did not amend or repeal sec. 103.53, Stats., which makes lawful the doing of certain things in labor disputes. It also redefined the term "Labor dispute" as found in ch. 103, as follows:

"103.62 (3) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The act also established rules for determining when a case shall be held to involve or grow out of a labor dispute. The definition of 'labor dispute' and the rules for determining when a case shall be held to involve or grow out

of a labor dispute contained in ch. 57 of the Laws of 1939 are widely different in theory and purpose from like provisions to be found in the statutes of 1937, which they supplanted. Chapter 57 limits a labor dispute to a case where there is a controversy between an employer and a majority of his employes in a collective bargaining unit. The definition contained in sec. 103.62 (3), stats. 1937, was very much broader and much more inclusive than that contained in sec. 103.62 (3), stats. 1939.

Upon the oral argument great stress was laid upon the fact that according to the terms of the act an employe was deprived of his constitutional right of freedom of speech. Appellants support their contention in this regard by [fol. 60] reference to the case of Thornhill v. Alabama (1940), 310 U. S. 88, 60 Sup. Ct. 736, 84 L. ed. 1093. Counsel, however, ignore the fact that the Thornhill case dealt with a statute which prohibited loitering or picketing and declared picketing to be a misdemeanor. As construed by the state court it prohibited the publicizing of the facts of a labor dispute whether by printed sign, by pamphlet, by word of mouth or otherwise. The peace act deals with concert of action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike.

The peace act, however, does not forbid picketing. It attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees. The peace act expressly provides that it shall not be so construed as to impair the right of free speech. One violating the provisions of the peace act is not guilty of a misdemeanor. His act is merely declared to be an unfair labor practice. The right to speak freely is guaranteed by the constitution but that right the same as other rights guaranteed by the constitution is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, fraud, although speech was the agency in each case. John F. Jelke Co. v. Beck (1932), 208 Wis. 650, 242 N. W. 576, Wisconsin Labor Relations Bd. v. Fred Ruepling Leather Co. (1938), 228 Wis. 473, 279 N. W. 673. See also Schenck v. United States (1919), 249 U. S. 47, 39 Sup. Ct. 247, 63 L. ed. 470, Gitlow v. New York (1925), 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138.

The act does not limit the right of an employe to speak freely. It declares cooperating "engaging in, promoting

or inducing picketing, boycotting" etc. in aid of an unauthorized strike, to be an unfair labor practice. The fact that an employe in the course of doing the designated acts [fol. 61] may use speech as a means of carrying on his activities, does not bring the acts within the protection of the constitutional guaranties of free speech. The term "picketing" as used in subsec. (2) (e), Sec. 111.06, stats. 1939, does not include acts held in the Thornhill case supra to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the Thornhill case says the state has power to deal with "as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents".

Par. (e) by its terms does not apply to an individual. An individual cannot cooperate with himself. Par. (e) does not forbid an employe to quit his employment individually or in concert with others. It does not forbid an employe singly or in concert with others from bringing about a vote by a collective bargaining unit as to whether there shall be a strike. By the act strikes are divided into two classes,—authorized and unauthorized. Par. (e) has no application except in the case of an unauthorized strike. It is the act of cooperating in engaging in, promoting or inducing picketing, boycotting or other overt acts in support of an unauthorized strike that par. (e) declares to be an unfair labor practice. Nowhere in the act is it declared that engaging in, promoting or inducing picketing, boycotting or any other act concomitant of a strike shall be deemed to be an unlawful act. It is declared merely to be an unfair labor practice. Our attention has been called to a decision of the Supreme Court of the State of Oregon, American Federation of Labor, Plaintiff v. James R. Bain et al., Defendants, (Or.), 106 Pac. (2nd) 544, decided October 22, 1940. The statute under consideration in that case was widely different from ch. 111, stats. 1939. In construing this statute, the Supreme Court of Oregon said: (106 Pac. (2nd) 544, 554) [fol. 62] "In the statute there is no definition of the word 'picket'. It is a word of 'vague contours,' as the Supreme Court said in the Thornhill case, and doubtless may be used to indicate conduct of a noxious character with which the state has power to deal. But it also embraces activities

which the Supreme Court holds the state may not lawfully suppress. It includes, we think, the conduct of one who walks or patrols in the vicinity of a place of business, involved in a labor dispute, and by word of mouth, banner or placard, undertakes to give information to the public concerning such dispute. The conduct of such person may be peaceful or otherwise; his demeanor orderly or threatening; the information true or false. The activity may be, and usually is, incident to an organized effort to prevail in the controversy, and we concur in the view of counsel for the defendants that it was precisely picketing by a member of a labor union and on behalf of his organization that the voters had in mind when they enacted this law. But that the activities embraced by the word 'picket' were intended to include such as are free from violence, intimidation and fraud,—what is ordinarily called 'peaceable picketing'—we think there can be no doubt. It follows that the very type of conduct which the Supreme Court held in the Thornhill and Carlson cases to be protected by the Fourteenth Amendment, is denounced by the Oregon statute unless engaged in incident to a controversy relative to wages, hours or working conditions, between an employer and a majority of his employees."

As already pointed out the Wisconsin statute expressly provides that it shall be so construed and applied that it shall not interfere with the right of free speech. As we understand and construe the statute the right of free speech is not interfered with. The conduct complained of in this case and described as "picketing" was not the sort of conduct that was indulged in by the defendant in the Thornhill case supra. The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing, organized and carried on by the unions supplemented by boycott and violence and was clearly within the exception stated in the Thornhill case warranting state action. In that case, the Supreme Court of the United States said: (p. 105)

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."

[fol. 63] Chapter 111, Stats. 1939 is a statute of that character. We do not understand the decisions of the United States Supreme Court to mean that there can be no regulation of the right of picketing. That Court has not yet said that a person who goes upon the premises of another for the purpose of creating a disturbance and disorganizing the other's business, is protected in the doing of such acts by the constitutional guaranty of free speech. In this case it is undisputed that numerous assaults were committed by pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution. In this respect it differs fundamentally from the statute that the Oregon Supreme Court had under consideration.

The effect of pursuing a course of conduct which under the statute amounts to an unfair labor practice is:

(1) to subject the actor to the provisions of sec. 111.07, stats. 1939. Under it he may upon complaint be brought before the Board where he may answer the complaint and appear in person or otherwise at the hearing, of which a full and complete record is required to be kept. After the final hearing the board is required promptly to make [fol. 64] and file its findings. The board may by its final order dismiss the charges or require the person complained of to cease and desist from the unfair labor practice found to have been committed, suspend his rights of immunities, privileges or remedies granted or afforded by the chapter for not more than a year and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. The determination of the board may be enforced by the judgment of the circuit court.

(2) When a person is found guilty of an unfair labor practice he loses the benefit of sec. 103.53 Stats. 1939 which prescribes what acts whether performed singly or in con-

cert shall be legal in the conduct of a labor dispute. He is thereby remitted to his rights under the constitution, other statutes and the common law. This is recognized in sec. 111.07 (1), which provides in part:

"Nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

This exception of course applies to the employe, employer or any person connected with a particular controversy as described in sec. 111.06 (3) Stats. 1939.

"An employee who is guilty of an unfair labor practice may lose his status as an 'employee' as defined in sec. 111.02 (3)." Stats. 1939.

No rights of a person guilty of an unfair labor practice are invaded until there has been a final determination by the board. The statute is not self-executing. It merely provides the machinery by which certain described labor practices may after due hearing, be held to be unfair and the person complained of ordered to cease and desist there-[fol. 65] from. Nothing in the act prevents or was intended to prevent employees from making such demands upon their employer as they think the circumstances warrant. Whether such employees act singly or in concert they are within their rights in making such demands upon their employer. We find nothing in the act which prevents a minority of a collective bargaining unit from withdrawing from employment either singly or in concert. They are not guilty of an unfair labor practice in so doing. But if they attempt to coerce their employer by concerted picketing, a boycott or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice as defined in the act. We say similar overt act because the maxim of ejur dem generis applies. C. & N. W. Ry. Co. v. Railroad Comm. (1916), 162 Wis. 91, 155 N. W. 941.

The petitioners complain that the characterization of the acts of employees as unfair labor practices cannot be made to depend on the action of a majority of a collective bargaining unit; that the legislature cannot place it within the power of a majority of the collective bargaining unit to authorize a strike. This argument is an attack upon a principle which is fundamental in the attempt of the legislature and of congress to regulate labor relations. The

principle upon which authorized collective bargaining depends is that the rule of the majority within an appropriate collective bargaining unit shall bind the minority. We see no way by which the principle of collective bargaining can be maintained unless this right of a majority of a collective bargaining unit to speak for the unit including the minority is maintained. A bargain on behalf of a collective bargaining unit amounts to nothing if after it is made, the individuals or some of them comprising that unit are not affected thereby. This principle is explicit in the Na- [fol. 66] tional Labor Relations Act, in the Railway Labor Peace Act, and in the act now under consideration. If the majority of a collective bargaining unit can thus coerce the minority in the matter of bargaining, we see no reason why the legislature may not vest in a majority of the unit power to determine whether such conditions obtain in the employment as warrant the calling of a strike in an effort to remedy them. There is no more delegation of legislative power in the one case than there is in the other. It is in most cases the same majority that made the bargain for the unit that determines whether a strike shall be called. We see in this no delegation of legislative power. Whether the conditions are such in the employment as justify the employees in striking is a matter more particularly within the knowledge of the employees than anyone else and is in the last analysis merely a question of fact. A vote of the majority of the employees in a collective bargaining unit to strike is a determination that facts exist which justify it. When such determination is made, subsec. (2) (e) Sec. 111.06, Stats. 1939, does not apply. The method of determining when a strike is justifiable is almost identical with the method provided for the submission to a municipality of whether a particular law shall be effective within that municipality. The electors determine upon the basis of their own knowledge whether conditions are such as to make the operation of the law within the municipality desirable and conducive to the general welfare. That also is a question of fact. When a majority have voted to call a strike, the means and methods of coercion which they may employ are not unlimited or unrestricted. Less than a majority may strike but they will be under the restrictions of [fol. 67] the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what

may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between coercive acts in support of a strike which has been called by a majority of members of a collective bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by indulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111 Stats. 1939, relating to unfair labor practices. The character of their coercive acts must then be determined either by submitting the controversy to the board or by "the pursuit of legal or equitable remedies in courts of competent jurisdiction". If one merely withdraws from his employment he is not subject to the act.

On behalf of the appellants fear is expressed that a "servile, docile or moribund majority refuses to place its stamp of approval, to grant a license, to the carrying on of peaceful, truthful appeals to the public".

This argument seems to disregard the fact that the question of whether intolerable working conditions, oppressive wages or killing hours need correction is submitted to a majority of the group which must be suffering under these same conditions, the majority cannot by their action impose anything upon a minority that they do not by the same action impose upon themselves.

[fol. 68] There is nothing in the history of the labor movement to warrant any fear that labor will be servile, docile or moribund. On the contrary, no group within the body politic has shown itself more willing to stand upon its rights and sacrifice present advantage for future benefits than has labor.

The petitioners further contend that the cease and desist order is too broad; that even though the petitioners have been found guilty of unlawful labor practices in the conduct of their unauthorized strike, that all picketing and boycotting cannot be forbidden by the board and cite as authority for their contention, May's Furs and Ready to Wear, Inc., v. Bauer (1940), 282 N. Y. 331, 26 N. E. 2d 279. The proceeding in the May's v. Bauer case was one for

injunctive relief. This contention is based on the assumption that the rules which apply to a court in granting injunctive relief apply in the hearing before the board. In May's Furs and Ready To Wear case, the employer sought an injunction in a court of equity. The court said: p. 337.

"Upon this appeal there is involved the scope and application of a legislative enactment whose wisdom or lack of wisdom is not a consideration open to judicial inquiry. Subject only to constitutional restrictions, it is the duty of this court to apply the statute as enacted by the Legislature."

The question decided was that the statutes of the state of New York providing that the court should not issue injunctions in a case growing out of a labor dispute except in accordance with the provisions of the statute were controlling; that under the statute the court could not enjoin lawful acts committed in support of a strike. We have a similar statute in Wisconsin (Sec. 103.56) but by sec. 111.17, Stats. 1939, it is provided that the provisions of ch. 111 Stats. 1939 shall prevail wherever they conflict with the provisions of other statutes. This Court is under the [fol. 69] same duty to declare the law in accordance with the provisions of ch. 111 that the court of the state of New York was under to declare the law in respect to injunctions in labor disputes and for the same reasons.

It is argued that the terms "picketing" and "boycotting" are so vague, indefinite and uncertain as to render subsec. (2) (e) Sec. 111.06 Stats. 1939 void. In support of that argument cases relating to the construction of statutes defining criminal offenses are cited. Chapter 111 Stats. 1939 creates no criminal offenses. Violation of any of its terms does not subject the actor to criminal prosecution. The board is charged with the duty of enforcing the act. The power of the board relating to enforcement does not arise until some party in interest has filed a complaint in writing.

There can be no question but that the purpose of the legislature in enacting ch. 111 Stats. 1939 was widely different from the purpose which actuated it in the enactment of ch. 111, Stats. 1937, which was repealed. It appears from the briefs that much complaint was made because ch. 111, stats. 1937, made no provision with respect to unfair labor practices by employees. In providing for "indus-

trial peace, regular and adequate income for employees and the uninterrupted production of goods and services", [Sec. 111.01 (2) Stats. 1939] we see no reason why the legislature may not forbid concerted picketing and boycotting in aid of an unauthorized strike. Under Sec. 103.51, etc., stats. 1937, it was held that the plant of an employer might be picketed although there was no dispute between him and his employees and the employer employed no members of the union. American Furn. Co. v. I. B. of T. C. & H. of A. (1936), 222 Wis. 338, 268 N. W. 250. Under the [fol. 70] same statute it was held that a labor union might conduct picketing operations for the purpose of coercing an employer to desist from performing work in his own business and in connection with projects undertaken by him. Senn v. Tile Layers Protective Union (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 872. It is apparent that the legislature was of the view that too wide a latitude was given to employees in their attempts to coerce their employers. All these questions relating to rights of employees to organize, conduct strikes, boycotts and other coercive measures are in the field of public policy. As the Court of Appeals of New York said in the case already cited and as this Court has said many, many times these questions are for the legislature. Courts do not sit to pass upon the wisdom or unwisdom of the acts of the legislature. In order to preserve order and prevent breaches of the peace and assure to all citizens their lawful rights, the legislature may well forbid the doing of acts which under other circumstances would be lawful. The acts committed by the petitioners as shown by the findings in this case would have justified injunctive relief under the common law or any labor relations statute, either state of federal.

While in the absence of legislation it was necessary for the Court to declare public policy in controversies relating to labor relations, when the legislature acts within the constitutional limits of its power, its mandates supersede court decisions and control as to future controversies. Both parties to a labor dispute are under the same constitution and both are subject to the valid acts of the legislature. Just where the line should be drawn in an effort to balance the bargaining power of the parties is primarily a matter of public policy for the legislature and not a question of law for the courts.

[fol. 71] We discover no invasion of the right of freedom of speech either in subsec. (2) (e), Sec. 11.06, Stats. 1939, or in the way the law was administered by the board in this case. The right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated. Nor do we discover any such uncertainty or indefiniteness in the law as to render it invalid. While it is true that the terms "picketing" and "boycotting" are not terms of definite legal content, they are descriptive of a process well known to the law and when considered in connection with the other provisions of ch. 111 and ch. 103, Stats. 1939, the meaning of these terms becomes reasonably certain.

The statute is one providing for the regulation and protection of civil rights and therefore does not partake of the nature of a criminal statute. By engaging in an unauthorized strike an employe loses his status as an employe. He then has the same rights and is subject to the same liabilities as a third person. When he thus withdraws from his employment he is free to speak but his right to coerce his former employer is limited by the act. Except as his acts affect the employer he is under no restraint. It is true that the act limits the use of coercive measures as they have ordinarily been used in labor disputes but that is a matter for the legislature. It is not within the province of the court to pass upon the wisdom or unwisdom of the public policy declared by the legislature.

Since we interpret the order of the board to be co-extensive with the statute as construed, we find it unnecessary to modify the order or judgment.

By the Court: Judgment affirmed.

[fol. 72] And afterwards, to-wit: on the 25th day of November, A. D. 1940, the following motion for rehearing was filed by Appellant, in words and figures following, that is to say:

[fol. 73] STATE OF WISCONSIN IN SUPREME COURT, AUGUST TERM, 1940

No. 68

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as representatives of all the Members of Hotel and Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;

MILWAUKEE BUILDING TRADES COUNCIL,

All Affiliated with the American Federation of Labor, Petioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD: Henry C. Fuldner, individually and as Chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of the Wisconsin Employment Relations Board; Plankinton House Company, Respondents.

MOTION FOR REHEARING

Now come the appellants above named by Padw..y, Goldberg & Tarrell, their attorneys, and respectfully move the Court for a rehearing in the above entitled matter for the following reasons, to-wit:

[fol. 74] 1. The Court did not give full weight and effect to the decisions of the United States Supreme Court in the cases of Thornhill v. Alabama, 84 L. Ed. (Adv. Op.) 659, and Carlson v. California, 84 L. Ed. (Adv. Op.) 668.

2. The Court erred in concluding that the Constitution of the State of Wisconsin and the Constitution of the United States does not apply with equal force and effect to peaceful concerted exercises of the rights therein enumerated as well as to peaceful individual exercises of such rights.

3. The Court erred in failing to modify the judgment of the Circuit Court and the Wisconsin Employment Relations Board so as to permit the peaceful and lawful activities assured to the appellants and each of them under the Constitution of the State of Wisconsin and the Constitution of the United States.

4. The Court erred in holding that the right to peacefully picket, patrol, advertise and to engage in the right of free speech can be made to depend upon a license granted by a majority of employees in a designated unit.

5. The Court erred in holding that the provisions of Section 111.06 (2) (c) constituted a regulation of the exercise of the rights guaranteed by the Constitution of the State of Wisconsin and the Constitution of the United States rather than an absolute prohibition thereof to a minority.

6. The Court erred in holding that the legislature may validly outlaw certain types of strikes and call such strikes "unauthorized strikes" and thus prohibit the right to strike to minority groups in the State of Wisconsin.

[fol. 75] 7. The Court erred in holding conduct to be coercive which has been declared by the Supreme Court of the United States to be the exercise of the right of free speech and assemblage guaranteed by the Fourteenth Amendment to the Constitution of the United States.

8. Section 111.06 (2) (c) Wis. Stats. 1939 as construed by this Court and the order of the Wisconsin Employment Relations Board based thereon are in violation of the First Amendment to the Constitution of the State of Wisconsin and the Fourteenth Amendment to the Constitution of the United States in that the appellants herein and all others similarly situated have been denied the equal protection of the laws and have been deprived of their liberty and property without due process of law.

9. The decision of the Court deprives these petitioners and each of them of the rights, privileges and immunities

assured to them by the Constitution of the State of Wisconsin and the Constitution of the United States.

10. The decision of the Court requires clarification and correction in certain important aspects, so that the rights and duties of these appellants and all others who may be similarly situated can be more precisely ascertained.

11. The Court erred in holding that vesting the fact finding power in nonofficial, miscellaneous and indefinite groups does not constitute an unlawful delegation of legislative powers contrary to the Constitution of the State of Wisconsin.

[fol. 76] And for such other reasons and on such other grounds as will be set forth in the printed argument hereafter to be filed for the appellants in support hereof.

Padway, Goldberg & Tarrell, Attorneys for Petitioners and Appellants.

Dated November 23, 1940.

[fol. 77] Endorsements: State of Wisconsin, Milwaukee County, Supreme Court, August Term, 1940. No. 68.

Hotel & Restaurant Employees' International Alliance No. 122, Petitioners and Appellants,

vs.

Wisconsin Employment Relations Board et al., Respondents.

Motion for Rehearing

Service of a copy of the within admitted this 23rd day of November 1940. Herman Knoeller, Attorney. Miss Mac Niven.

Padway, Goldberg & Tarrell, Attorneys for Petitioners and Appellants, 511 Warner Theatre Bldg., Milwaukee, Wis.

Filed November 25, 1940. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fol. 78] And afterwards, to-wit, on the 25th day of November, A. D. 1940, an order was entered in this court re-

taining the record in this cause until the final determination of same, in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents.

The said appellants having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fol. 79] And afterwards, to-wit: on the 7th day of January, A. D. 1941, the same being the 1st day of said term, the motion was denied in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents.

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered and adjudged by this Court that said motion be and the same is hereby, denied, with $25.00 costs and costs of motion.

[fol. 80] Thereupon the opinion of the Court on motion for rehearing was filed in words and figures following, that is to say:

[fol. 81] Filed Jan. 7, 1941. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

In Supreme Court, State of Wisconsin

No. 68

August Cal., 1940; January Term, 1941

Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., Appellants,

vs.

Wisconsin Employment Relations Board, et al., Respondents.

On Motion for Rehearing

Rosenberry, C. J. On motion for rehearing. On this motion appellants open their argument with the following statement:

"Since receipt of the Supreme Court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.

"Only one thing was clear. That was that the Wisconsin Supreme Court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the Constitution of the United States. This for the sole reason that they were minority groups."

What counsel refer to is their claim that the act which provides that what is denominated in the opinion "an unauthorized strike", that is, one not made pursuant to a majority vote of employees, is an unfair labor practice, deprives the minority group of a constitutional right to strike and infringes the right of free speech. It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the [fol. 82] statute and as a consequence, misunderstand the opinion.

Section 111.15 of the Employment Peace Act provides, among other things:

"Except as specifically provided in this chapter nothing therein shall be construed so as to *interfere with or impede or or diminish in any way the right to strike* * * *; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*"

The last sentence contained in the opinion is:

"Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment."

It is explicitly stated in the opinion that the order of the Board, the judgment of the circuit court affirming it and the opinion of this Court did not deal with anything approaching peaceful picketing. We pointed out—

"In this case it is undisputed that numerous assaults were committed by pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution."

How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the Thornhill case, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in.

[fol. 83] We did not deal with every provision contained in the Employment Peace Act for the reason, as stated in the opinion, upon this appeal sec. 111.06 (2) (e) Stats. 1939,

was the only section of the statute drawn in question and it is with the construction of that section that we deal and it is explicitly so stated in the opinion. We did not attempt because it was not involved in this case to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e) as construed does not prohibit, as described in the Thornhill case, peaceful picketing. We may say this however, that the statute does not authorize the majority group even though it has voted to strike, to commit acts of violence, to take possession of the employer's property and forcibly to prevent ingress and egress to and from the premises.

The appellant employees, unions and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board.

This Court does not seek applause on the ground that it is progressive and liberal or indeed upon any other ground. The Court has, however, a duty, fairly and impartially to apply and interpret the law in all cases where the rights of citizens are involved to the end that their rights under the constitution and the law may be preserved to them inviolate. This duty it strives to discharge with fidelity to the law and the constitution. As was said in American Furn. [fol. 83½] Co. v. I. B. of T. C. & H. of A. etc. (1936), 222 Wis. 338, 365, 268 N. W. 250, 106 A. L. R. 335, "We conclude that the act as we construe it * * * is a valid exercise of legislative power * * * Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and views theretofore expressed in judicial opinions."

By the Court—Motion denied with $25.00 costs.

[fol. 84] In Supreme Court, State of Wisconsin

Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., Appellants

vs.

Wisconsin Employment Relations Board, et al., Respondents

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause in this Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 26th day of May, A. D. 1941.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

[fol. 85] Supreme Court of the United States

No. —, October Term, 1940

Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., Petitioners,

vs.

Wisconsin Employment Relations Board, et al.

Order Extending Time Within Which to File Petition for Certiorari

Upon consideration of the application of counsel for the Petitioners,

It is ordered that the time within which to file petition for certiorari in the above entitled cause be, and the same is hereby, extended to, and including, June 3d, 1941.

Frank Murphy, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of April, 1941.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.